why they are pursuing their collection action before the SDNY Court. The issue of damages that AT&T owes to the CAPs is not before this Commission, however – the Commission is without authority to hear claims against non-carriers,[25] and in this case AT&T is appearing as a customer, and not a carrier.[26] The CAPs deny that they may only recover compensation for the services AT&T took through a tariff or negotiated contract. As the CAPs discuss at length in this Answer and the accompanying Brief, they are entitled to an award of damages in *quantum meruit* from the SDNY Court.

56. The CAPs admit that AT&T correctly quotes from two Commission orders in the first sentence of paragraph 56. The CAPs admit that the *Liability Order* stands for the proposition that they "played no role in the routing of long distance traffic from AT&T, and that they did not own any switches that were used to terminate long distance calls." This finding that the CAPs were "sham" entities means that, at no time relevant to the instant case, did they act as common carriers. The CAPs admit that they did not employ unbundled network elements. The *Liability Order* finds, the fundamental purpose of the CAPs operations was to cause calls from AT&T's long distance customers to be completed to the chat and conference operators that AT&T's customers chose to call. This is, of course, the purpose of access stimulation, as recognized by the Commission in cases ranging from *Total Telecommunications* to the *Connect America Order*. As discussed further in this Answer and its accompanying Brief, it is an established fact that the CAPs successfully caused switched access voice service to terminate to the numbers that AT&T's customers called, and AT&T is estopped from denying it. The CAPs admit that the *Liability Order* found that they did not operate as "bona

[25] MCI Telecom's Corp. v. FCC, 59 F.3d 1407, 1419 (D.C. Cir. 1995)(FCC cannot adjudicate carriers' rights against their customers).

[26] *All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, 726-28 (2011)(finding that AT&T's self-help refusals to pay All American's access charges does not violate the Communications Act because AT&T is acting in the capacity of a customer, not a carrier).

fide CLECs," that they did not own or lease facilities, and that they did not hold themselves out to provide service to the public at large, but rather served CSPs exclusively (and in All American's case, one CSP – Joy Enterprises – exclusively). Such finding demonstrates that the CAPs did not engage in "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public . . . ." (47 U.S.C. § 153 (53)), and so never acted as common carriers. CAPs deny that they are not entitled to compensation – as demonstrated in this Answer and the accompanying Brief, the CAPs caused a service to be provided to AT&T and AT&T would be unjustly enriched, and the CAPs unreasonably deprived, absent compensation. The CAPs will pursue such compensation before the SDNY Court in their pending collection action through their claim in *quantum meruit.* The *Eighth Report and Order* is not relevant precedent in support of this claim.

57. The CAPs admit that Beehive carried all traffic relevant to the case at bar, and was responsible for the routing and termination of the calls that AT&T's customers made to chat and conference service providers. All American admits that the calls terminated at Joy Enterprises equipment located in Beehive's facilities in Utah, not in Nevada. All American denies that this has any relevance to their claims for compensation, or to AT&T's claims for damages. The rates that apply to the Local Switching tail circuits that CAPs caused to be provided to AT&T reflect Beehive's tariffed rates. AT&T has at no time contested the routing or rating of Beehive's rates, and the Commission has never analyzed them.[27]

58. The CAPs admit that AT&T accurately quotes the *Liability Order* in paragraph 58. The CAPs admit that AT&T took "millions of minutes" of terminating switched access service from Beehive, via the CAPs. The CAPs deny that all of these millions of minutes of switched access traffic were "billed and provided in Nevada" – AT&T's witness Dr. David

[27] 7/16/10 Stipulation #35; Liability Order, 28 FCC Rcd at 3492 ¶ 33.

Toof computed the actual minutes of switched access service terminated to AT&T by Beehive in Utah and Nevada for the years 2006 – 2008 (the period in which most of the traffic at issue was terminated for AT&T). In doing so, he used NECA minute counts for Switched Access voice service reported by Beehive. He demonstrates that the Beehive traffic was closely divided between Nevada and Utah in 2006 and 2007, and significantly divided between those two states in 2008[28] AT&T and the *Liability Order* relied on the *Toof Report* in the Liability Phase of this case, and AT&T is estopped from raising contrary arguments now. All American admits that the *Liabilty Order* found that All American violated its tariff, but because that *Order* invalidated the All American tariff *ab initio*, All American's compliance *vel non* with the tariff is irrelevant to the case at bar. All American denies that it "provided no services at all to AT&T." As the CAPs demonstrate in this Answer and its accompanying Brief, AT&T's stipulations, pleadings and expert witness testimony demonstrate that it received switched access service, and AT&T is estopped from claiming otherwise now. The inconsistency of AT&T's position is demonstrated in paragraph 58 – in the same sentence, AT&T refers to the "millions of minutes" of traffic that was stimulated by the CAPs (indeed, that is the gravamen of its "traffic pumping" complaint), and then states that it received "no services at all." This obviously is a linguistic contortion that AT&T has attempted to invent in its vain and unlawful attempt to take the millions of minutes of terminating access service that it received over a period of years for free.

59. The CAPs admit that all of the traffic at issue was routed from AT&T to its point of termination in Beehive's facilities by Beehive. The CAPs admit that AT&T accurately cites and quotes the *Liablity Order* in paragraph 59. This finding, among the other findings of the *Liability Order*, establish that the CAPs were not acting as common carriers at all times relevant

[28] "MOU Data NECA Tier 2 Cost Companies 2004 – 2008", Expert Report of David. I Toof, PhD ("*Toof Report*"), dated November 11, 2009, at Exhibit DIT-8. AT&T Amended Complaint Ex. A.

to the case at bar. All American admits that it "did not have . . . an applicable access tariff because the *Liabilty Order* invalidated the All American federal tariff *ab initio*, but because the Commission did so in the *Liability Order,* All American's compliance *vel non* with the tariff is irrelevant to the case at bar. All American denies that it "did not provide any services to AT&T." As the CAPs demonstrate in this Answer and its accompanying Brief, AT&T's stipulations, pleadings and expert witness testimony demonstrate that it received switched access service, and AT&T is estopped from claiming otherwise now.

60. The CAPs admit that in paragraph 60 and footnote 71, AT&T accurately quotes the language from the Utah court's Order of Referral and the *Liability Order.*

61. All American denies AT&T's assertion in paragraph 61 that "All American did not provide any services, including any regulated services, to AT&T." AT&T and its expert witnesses admit throughout their pleadings that AT&T received terminating switched access traffic that was caused to be delivered by All American:

- Stipulation # 52: "AT&T has not disputed the number of minutes of traffic associated with the Joy telephone numbers. (Joint Statement of Stipulated Facts, dated July 16, 2010, stamped "Filed/Accepted July 20, 2010" ("7/16/10" Stipulation)).

- The number of Local Switching MOUs billed by All American exactly matches the number of Tandem Transport Facility and Tandem Transport Termination MOUs billed by Beehive, and that AT&T paid to Beehive without complaint. *Toof Report*, Exhibit DIT-10.

- 7/16/10 Stipulation # 58: "AT&T has paid some tandem switching and transport charges to Beehive for traffic destined to the CLECs."

- 7/16/10 Stipulation # 57: All numbers in the CAPs' bills reflect Beehive CLLI codes.

- 7/16/10 Stipulation # 70: All CAP equipment was located in Beehive offices.

- The Toof Report is based on the assumption that "All American's access minutes are properly attributable to Beehive . . . ." *Toof Report* at 5 ¶15.

- 7/16/10 Stipulation # 35: "AT&T is not challenging Beehive's interstate access tariff rates . . . ", also cited in *Liability Order* at 3492 ¶ 33 n.145.

And of course, the gravamen of AT&T's Amended and Supplemental Complaints is that the CAPs caused "millions of minutes" of terminating calls for AT&T's long distance customers.[29] Given these admissions – and plain common sense – AT&T is estopped from now claiming that it received no service at all. All American denies AT&T's assertion that it provided service to either Joy or Beehive. There is no support in the record of this case for such an allegation, and AT&T cites none. AT&T's attempt to make it appear as though the *Liability Order* made this finding is a sham – the plain language of the cited paragraph contains no such finding. It is undeniable that AT&T received millions of minutes in terminating switched access service, and that All American and the other CAPs caused it to be delivered. All American admits that it operations supported a single customer, Joy Enterprises, which confirms that All American at no time was acting as a common carrier. The CAPs deny that the findings of the Utah Public Service Commission, referenced in footnote 72, are relevant to the instant proceeding. The Utah Commission was analyzing local service, not the access service in this case, and was applying the rules of that Commission and state law. Its legal conclusions therefore are not relevant to the instant case.

62. ChaseCom and e-Pinnacle admit that the quote from the *Liablity Order* in paragraph 62 is correct. This further supports the legal conclusion that, as a result of the *Liablity Order*, none of the CAPs can be classified as operating as common carriers at any time relevant to this proceeding.

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[29] *E.g.*, Supplemental Complaint at ¶¶ 58, 59.

63. The CAPs deny that they "provided no services at all" to AT&T. As discussed in the answer to paragraph 61, and throughout this Answer and its accompanying Brief, AT&T is estopped by its prior statements, stipulations and expert witness report from making these assertions. The CAPs deny that they are not entitled to compensation. Now that the *Liability Order* has established that the CAPs never had valid tariffs, and never operated as common carriers, it is clear that they were operating in another capacity – as sales agents and billing agents – for the terminating switched access traffic that AT&T unquestionably received. In light of the Commission's ruling, the CAPs cannot receive the compensation to which they are entitled by enforcing their tariffs, and so must pursue their alternative theory of damages in *quantum meruit*, which is pending before the SDNY Court. Failure to obtain compensation in this venue would unjustly enrich AT&T and would unreasonably diminish the CAPs. The CAPs admit that the *Eighth Report and Order* is correctly cited, but deny that that *Order* requires that AT&T receive millions of dollars worth of terminating access service, over a period of years, for free. As discussed at length in the Brief that accompanies this Answer, nothing in the *Eighth Report and Order*, or any other Commission ruling, prevents the CAPs from pursuing just compensation for the services they caused to be delivered to AT&T in their *quantum meruit* action before the SDNY Court. In fact, as discussed at length in the CAPs' Legal Analysis In Support of the CLECs' Answer to AT&T's Amended Formal Complaint filed in the instant proceeding and dated June 14, 2010, at 41-48, the CAPs demonstrate that the Commission has been hearing disputes between AT&T and Beehive over access stimulation traffic to Joy Enterprises for over 15 years, and prior to the Genachowski Administration, has repeatedly denied AT&T's oppositions to such traffic,[30] and has prescribed switched access rates for such traffic.[31]

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[30] *Id.* at 46-47, citing, *e.g., AT&T Corp. v. Beehive Telephone Co., Inc., and Beehive Telephone, Inc. of Nevada*, 17

64. The CAPs deny that the only way they can demand payment from AT&T from the service it admittedly took is via a tariff or negotiated contract. The gravamen of AT&T's "damages" claim is a fabricated "Catch 22" in which AT&T never has to pay for the services it took: 1) The Communications Act and Commission's rules say that common carriers may only collect access charges through tariffs or negotiated contracts. 2) The CAPs at all times relevant to this proceeding believed they had valid tariffs on file at the Commission, and relied on those tariffs to seek payment for the services that they caused to be provided to AT&T, and that AT&T as admitted receiving. 3) But, the *Liability Order* took the unprecedented (until the Genachowski Administration) step of invalidating the CAP tariffs retroactively – a full 6 years after the CAPs filed their collection action, and 8 years after they started providing service. 4) The CAPs had no contract with AT&T for their service. 5) Therefore, AT&T gets millions of terminating access minutes of service, provided over a period of years, for free. Just as AT&T claims that because the CAPs did not provide service pursuant to their tariffs, they did not provide any service at all, it argues that, because the regulated means of collecting compensation – tariffs or contracts – do not apply, then the CAPs are without any recourse at all to seek compensation. Of course, this legal theory is ludicrous – to accept it, the Commission and the SDNY Court would have to ignore the reality that AT&T has received, and benefitted from, millions of minutes of access service for which it did not pay. The Commission and Court would also have to ignore the reality that the law provides for equitable relief in cases where the absence of regulatory relief leaves a gap – that gap is filled by the Courts applying

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FCC Rcd 11641 (2002).

[31] *Id* at 45, citing *Beehive Tel. Co., Inc., Beehive Tel. Co, Inc. of Nevada, Tariff FCC No. 1*, PA 97-1674, Suspension Order, 12 FCC Rcd 11695 ¶ 3 (1997); *Beehive Tel. Co., Inc., Beehive Tel. Co, Inc. of Nevada, Tariff FCC No. 1*, FCC 98-83, Order on Reconsideration, 13 FCC Rcd 11795, ¶ 5 (1998), *affirmed Beehive Tel. Co., Inc., v. FCC*, 180 F.3d 314 (D.C. Cir. 1999).

principles of *quantum meruit*.[32] In the answers to the following paragraphs, and in the Brief that accompanies this Answer, the CAPs demonstrate that the Commission, the SDNY court, and courts across the country allow for equitable relief where contracts or tariffs do not apply.[33] The CAPs will also demonstrate that AT&T itself routinely avails itself of this legal recourse in suits against non-paying customers.

65. The CAPs admit that AT&T accurately quotes § 203 of the Communications Act in paragraph 65, but this is irrelevant to the instant case because the *Liability Order* establishes that the CAPs are not, and never were, common carriers, and so are not subject to regulation under Title II of the Communications Act, including § 203. The cases cited in footnote 73 for the proposition that carriers cannot recover damages if they do not have a valid tariff on file. Not only do the cases cited by AT&T not stand for that proposition, they fully support the CAPs' argument that, now that the *Liability Order* has retroactively invalidated the CAPs' tariffs, and because the do not have a contract with AT&T, the CAPs must proceed with their claims for damages in *quantum meruit* before the SDNY Court: In *MCI WorldCom v. PaeTec*,[34] the federal district court enforced the provisions of a valid tariff. In *Union Tel. v. Qwest*,[35] the federal district court granted summary dismissal of Union's claims based on tariff and contract, for the common-sense reason that Union admitted that it had neither a tariff nor a contract. Importantly, the court went on to hear Union's claims based in discrimination and *quantum meruit*, and denied them both on the merits.[36] *Union Tel. v. Qwest* does not stand for

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[32] *Manhattan Telecommc'ns Corp. v. Global NAPs, Inc.*, 2010 WL 1326095 (2010) at 2 ("*MetTel v. GNAPS*") equitable claims are not preempted by the Communications Act, and may fill regulatory "gaps" caused by Commission action or inaction.).

[33] *Advamtel LLC, et al. v. AT&T Corp.*, 118 F. Supp. 2d 680, 689 (E.D. Va. 2000) (in collection action of multiple CLECs against AT&T, court granted AT&T's motion to dismiss the CLECs' quasi-contract claim, but only after determining that "[t]here is no dispute that each of the plaintiffs have a validly-filed tariff with the FCC.")

[34] *MCI WorldCom Network Svcs. v. PatTec Commc'ns, Inc.*, 204 Fed Appx. 271 (4th Cir. 2006).

[35] *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187 (10th Cir. 2007) ("*Union Tel*").

[36] *Id.* at 1195-97.

the proposition that the absence of a contract or tariff prohibits the hearing of a *quantum meruit* claim – it stands for the opposite. In *Hypercube v. Comtel*[37] the court granted summary judgment and dismissed claims made on two tariffs, because both tariffs were invalid.[38] The court retained jurisdiction to hear a *quantum meruit* claim made as an alternative claim by Hypercube. In doing so, the Court noted:

> Even if Excel is not required to pay Hypercube pursuant to the FCC's orders, the parties agree that if Excel constructively ordered service from Hypercube, it is obligated to pay for that service.[39]

Americana Expressways, Inc.,[40] is a trucking case that applies § 1312.20 of the regulations of the Surface Transportation Board. In doing so, a bankruptcy court dismissed a filed rate doctrine claim because the trucking company did not have a valid tariff. It is not clear how this case is relevant to the case at bar. With the exception of this last case, which is irrelevant, the other cases cited by AT&T actually stand for the opposite of AT&T's asserted claim – all of these courts allowed equitable claims to be argued at court as an alternative to contract and tariff claims.

66. The CAPs admit that paragraph 66 provides a fair summary of the CLEC tariffing rules adopted in the *Eighth Report and Order*. These rules are irrelevant to the case at bar, however, because the *Liability Order* voided the CAPs' tariffs *ab initio*, and because the CAPs are not common carriers, and so are not governed by Title II of the Communications Act. Footnote 74 is a cite and does not require a response.

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[37] *Hypercube LLC v. Comtel Telecom Assets LP*, 2009 WL 3075208 (N.D. Tex. Sept. 25, 2009).
[38] *Id.* at *4: "Hypercube was relying on an invalid tariff, upon which it cannot file suit. To the extent Hypercube seeks to recover fees incurred between those dates via the KMC Data, LLC tariff, it cannot—as a matter of law—do so."
[39] *Id.* at *7, citing *Advamtel LLC, et al. v. AT&T Corp.*, 118 F. Supp. 2d 680, 687 (E.D. Va. 2000) (discussing the requirements of a constructive ordering claim.)
[40] *Americana Expressways, Inc. v. Am. Pac. Wood Prods., Inc.*, 133 F.3d 752 (10th Cir. 1997).

67. The CAPs admit that paragraph 67 provides a fair summary of the Commission's tariffing rules for CLECs providing regulated services. These rules and cases are irrelevant to the case at bar, however, because the *Liability Order* voided the CAPs' tariffs *ab initio*, and because the CAPs are not common carriers, and so are not governed by Title II of the Communications Act. As discussed elsewhere in this Answer and accompanying Brief, the service taken by AT&T is terminating switched access service, provided by Beehive, and caused to be provided by the CAPs. Footnote 74 is a cite and does not require a response.

68. In paragraph 68, AT&T concludes that, because the CAPs did not follow the terms of their tariffs, the service they caused to be provided to AT&T cannot be classified as a regulated service. The CAPs deny this assertion – the traffic at issue in this case is, and always was, terminating switched access service provided by Beehive, and generated by the CAPs. In making its claims, AT&T conflates two separate issues: 1) the legal status of the CAPs and their role in generating traffic; and 2) the nature of the traffic itself. By conflating these issues, AT&T reaches the patently untrue conclusion that AT&T did not receive "any service at all" – and it has to take this position to support its argument that it should receive millions of minutes of service, over a period of years, for free. But as the CAPs have demonstrated, AT&T is estopped from arguing that it received no service – its own stipulations, testimony and expert witness report confirm that it did. See, e.g., answers to paragraphs 58 and 61 above. The *Liability Order* confirms that the traffic was provided by Beehive.[41] AT&T has provided no precedent, and no argument, that the service it took could be classified as anything other than switched access service, and the conclusion that the service taken by AT&T was switched access service is consistent with the only Commission decision factually identical to the case at

[41] 28 FCC Rcd. at 3488 ¶ 27 and *passim*.

bar – the *Total Telecom* decision.[42] In that decision, the Commission found that an access stimulation-based CLEC was a "sham" and that the service was actually provided by the underlying incumbent local exchange carrier.[43] That case has been characterized by Judge Pauley – the judge who is hearing the SDNY Collection action and who referred the questions at issue in this proceeding to the Comission – as "determining that the proper remedy for a sham entity violation was the reasonable tariff that would be charged in the absence of a sham entity."[44] The record in this case and relevant precedent therefore determine that the traffic at issue in this case is terminating switched access service. Footnote 76 is a citation and requires no response.

69. The CAPs admit the first three sentences of paragraph 69. The CAPs deny AT&T's conclusion that Defendants did not "provide" AT&T with a regulated service – as discussed above, the record in this case demonstrates that the CAPs caused switched access service to be provided to AT&T via Beehive. The CAPs deny AT&T's conclusion that the CAPs cannot "lawfully recover compensation" from AT&T – as discussed above, the CAPs will pursue claims in *quantum meruit* before the SDNY Court. This issue is discussed at length in the answers to the paragraphs in Section III of AT&T's Supplemental Complaint, and in the Brief that accompanies this Answer.

70. The CAPs deny AT&T's assertion in paragraph 70 that they are like other CLECs because the findings of the *Liability Order* establish that they are not, and never have been, common carriers or local exchange providers. The CAPs admit that they have cited to footnote 96 and the cases cited therein for the proposition that they are entitled to compensation

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[42] *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726 (2001), *aff'd in part, rev'd in part sub nom., AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003) ("*Total Telecom*").
[43] *Id.* at 5742.
[44] AT&T Ex. 1 at 6-7 (other citations omitted).

for the switched access service that they caused to be provided to AT&T, and that AT&T admittedly took from them (and Beehive). The CAPs also cite these cases for the proposition that the Commission has already, and repeatedly, rejected the argument that is the gravamen of AT&T's "Damages" complaint – that because service was not provided pursuant to a tariff, the customer gets to take it for free. Footnote 77 is a citation and does not require an answer.

71. The CAPs admit that the Farmers III decision found that the incumbent LEC at issue violated its tariff in providing access stimulation service. This was the first decision under the Genachowski Administration in an access stimulation case, and the first case in the Commission's history where it invalidated a tariff retroactively, after the carrier provided millions of dollars of switched access service over a period of years. In doing so, the Genachowski Administration reversed a decision made under the Martin Administration that followed the Commission's historic practice of ordering changes to tariffs and carrier practices on a prospective basis. The CAPs admit that AT&T accurately recounts the gist of footnote 96 of the *Farmers & Merchants III* decision, and that the cited language is dicta.

72. The CAPs admit that the referenced language in the *Farmers & Merchants III* decision is dicta. The CAPs deny that the referenced language does not support a claim for CAP damages – the plain language of the footnote clearly does. Footnote 96 is quoted in its entirety and discussed in the CAPs' answer to paragraph. 39. But the CAPs want to make clear that the Commission is not deciding CAP damages in the instant proceeding, and it has no authority to do so.[45] This is why the CAPs filed their collection action in the SDNY Court, and not with the Commission. The CAPs deny that "they did not even provide services to AT&T" – they show throughout this Answer (*e.g.*, answer to ¶¶ 58, 61) and the accompanying Brief that

[45] *E.g., U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552 (2004) ("the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. . . .:) ("*Telepacific v. Tel-America*").

this statement is belied by the record and AT&T is estopped from making this claim. The CAPs agree that the quote from the *Farmers & Merchants III* decision confirms that that order made no findings regarding damages. Indeed, while the Genachowski Administration issued several orders that retroactively voided the tariffs of local exchange carriers for access stimulation traffic, it did not conclude "liability phase" hearings in any of those cases – it left this, the first and so far only "Liability Phase" case, to the following Administration. The CAPs admit that AT&T accurately quotes the *Farmers & Merchants III* decision in stating that "a carrier may be entitled to some compensation . . . .: This statement failed to resolve the matter, because as AT&T admits, no liability hearing was every completed in that case. But this statement *does definitively* reject AT&T's assertion that, as a matter of law, absent a valid tariff or contract, compensation can never be enforced against a carrier that took service. Because this assertion is the foundation for AT&T's entire "Damages" Phase complaint, the Complaint must be dismissed. Footnote 79 is a citation and requires no response.

73. The CAPs deny that the "totality of the circumstances" make clear that they are not entitled to compensation, and they will pursue their claims in *quantum meruit* before the SDNY Court. The CAPs deny that AT&T "did not provide any service" to AT&T, no matter how many times it repeats this assertion, and they show throughout this Answer (*e.g.,* answer to ¶¶ 58, 61) and the accompanying Brief that this statement is belied by the record and AT&T is estopped from making this claim. The CAPs admit that the *Liability Order* found they were not "bona fide CLECs" and were "sham CLECs" – in so finding, the *Order* establishes that the CAPs are not, and never were common carriers, and are not subject to Title II regulation. The CAPs admit that the reference to the *Liability Order's* statement regarding $11 million in "improper" access charges is accurate. As to the significance of this finding, it constitutes a

finding by the Commission that the services at issue are switched access services. The use of the term "improper" is never defined in the *Liability Order,* and is ambiguous. The *Liability Order* never made a finding that the Beehive rates that were charged for the $11 million worth of terminating switched access service were unreasonable, and never conducted an inquiry into those rates. Indeed, the *Order* finds that "it is *Defendants' conduct,* not Beehive's rates, that is at issue."[46] This finding does not support AT&T's assertion that the CAPs are not entitled to compensation.

74. The CAPs deny that footnote 96 of *Farmers III* does not help their case – as discussed in the answer to paragraph 73, and below, this statement of the law completely undercuts AT&T's assertion that the CAPs have no recourse for compensation outside of a tariff or contract. The CAPs admit that AT&T's summary of the *New Valley* decisions is accurate. Footnotes 81 – 84 are citations and no response is required.

75. The CAPs admit that the *Northern Valley* case reflects facts that are different from those underlying the case at bar. The CAPs deny that these factual differences diminish the precedential value of the case as supporting the legal conclusion that the CAPs may seek compensation, even if they do not have a valid tariff or contract. In making its initial determination, the Common Carrier Bureau denied the argument that parties seeking compensation have no recourse if the tariff is not applicable. Moreover, it reached this conclusion after conducting an exhaustive review of the relevant precedent:

> New Valley relies on the court's decision in *Maislin*[47] to support its principal claim that it is entitled to a refund of all charges paid for the circuits at issue because PacBell's tariff did not authorize PacBell to charge and collect for the circuits. We find no basis in Maislin or any other court or Commission decision for the conclusion that a customer may be exempt from paying for

[46] 28 FCC Rcd at 3492 ¶ 33 (emphasis in original).
[47] *Maislin Industries, Inc. v. Primary Steel, Inc.*, 497 U.S. 161 (1990).

services provided by a carrier if those services were not properly encompassed by the carrier's tariff.[48]

The CAPs deny that they "provided no service to AT&T" – they show throughout this Answer (*e.g.*, answer to ¶¶ 58, 61) and the accompanying Brief that this statement is belied by the record and AT&T is estopped from making this claim. Moreover, the CAPs deny that the service they caused to be provided to AT&T is not "functionally equivalent" to switched access service – in this Answer (*e.g.*, answer to ¶¶ 49, 56) and the accompanying Brief the CAPs demonstrate that AT&T's expert witness, AT&T's stipulations and pleadings, and the *Liability Order* all confirm that the service at issue is switched access service, and AT&T is estopped from asserting otherwise. The CAPs admit that the *New Valley* decisions do not involve any "sham entity" findings – but the one Commission case that does, *Total Telecom*, reaches the same conclusion as the *New Valley* decisions. The *Total* case involved the Atlas Telephone Co., an Oklahoma ILEC, which created a CLEC, Total Telecommunications Services, Inc., for the purposes of generating access stimulation traffic to Audiobridge of Olkahoma, Inc., a chat line provider. The Commission found that Atlas and Total were "intertwined,"[49] that "Audiobridge obtains all of its revenues from Total,"[50] and that "Total would pay Audiobridge commission payments of 50 to 60 percent of Total's terminating access revenues from calls completed to Audiobridge."[51] The Commission found that Total Telecom was a "sham"[52] AT&T, the complainant in the *Total Telecom* case, cited that case repeatedly in its Amended Complaint against the CAPs in the instant proceeding, because that case was the first and only time the Commission found a CLEC to be a "sham"entity and an alter ego of the underlying incumbent

[48] *New Valley Order*, 8 FCC Rcd at 8127 ¶ 8.
[49] *Total Telecom*, 16 FCC Rcd at 5727 ¶ 3.
[50] *Id.* at 5729, ¶¶ 5, 7.
[51] *Id.* at 5729, ¶ 7.
[52] *Id.* at 5732, ¶ 14.

LEC. Yet AT&T's Supplemental Complaint for Damages does not mention the *Total Telecom* case once. The reason is that, after concluding that Total Telecom was a sham entity, the Commission found:

> We reject AT&T's argument that the unlawful relationship between Atlas and Total, in and of itself, makes it unreasonable for Total to charge anything for the access services provided to AT&T. Complainants did provide a service to AT&T, *i.e.*, completing calls from AT&T's customers to Audiobridge. Moreover, AT&T recovered revenue through ordinary long-distance rates from its own customers for calls completed to Audiobridge. Finally, Complainants may not be able to recover their legitimate costs, if any, through other means, that they are entitled to recover. Therefore, Total's unlawful relationship with Atlas, standing alone, does not preclude Complainants from charging "reasonable" access charges from AT&T. * * * Given the particular circumstances of this case, we conclude that a reasonable access charge is the fee that Atlas would have charged AT&T for terminating traffic directly to Audiobridge, had Total never existed.[53]

Therefore, while *New Valley* does not deal with a sham entity ruling, *Total Telecom* does, and reaches the same conclusion as New Valley – and expressly rejects AT&T's claim that no compensation was due as a result of the "sham entity" finding.[54] Regarding footnote 85, the CAPs deny that AT&T's assertions that the language of the CAP tariffs demonstrate that they did not provide access service is relevant – the *Liability Order* invalidated the CAP tariffs *ab initio*, and so their compliance *vel non* with the provisions of those tariffs are irrelevant. In this Answer (*e.g.*, answer to ¶¶ 49, 56) and the accompanying Brief the CAPs demonstrate that AT&T's expert witness, AT&T's stipulations and pleadings, and the *Liability Order* all confirm that the service at issue is switched access service, and AT&T is estopped from asserting otherwise. Regarding footnote 86, AT&T is estopped from claiming support from the

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[53] *Id.* at 5742, ¶ 37 (footnotes deleted).

[54] The ruling of the *Total Telecom* case was reviewed by the U.S. Court of Appeals for the District Columbia Circuit, which remanded the decision in part, ordering the Commission to expressly address AT&T's argument that neither Atlas nor Total Telecom provided it with "access service." *AT&T Corp. v. FCC*, 317 F.3d 227, 336-37 (D.C. Cir. 2003). The parties apparently settled the case, and the Commission did not issue a further order.

Commission's *Connect America Order*. In its Opposition of AT&T Corp. to Defendants' Petition for Reconsideration in the above captioned proceeding, dated May 6, 2013, at 14-15, AT&T argues that the *Connect America Order* has only prospective effect, and as such "will have no binding effect on pending complaints," including the case at bar. As the CAPs have maintained consistently since the *Connect America Order* was released, it is relevant to the case at bar, and establishes definitively that the services that the CAPs caused to be delivered to AT&T – like all access stimulation services – are switched access service.

76. The CAPs deny that they are not entitled to compensation for the services that AT&T took. Finally, since paragraphs 70-76 of the Supplemental Complaint all deal with footnote 96 of the *Farmers & Merchants III Order*, the CAPs note that AT&T has ignored the *America's Choice* case.[55] In that case, the Commission refused to hear a complaint that, because defendants did not have a tariff in effect, they are not obligated to pay for the services they took, because this claim was not raised in the initial complaint. Regardless, the Commission went on to state: "We note, however, that a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed."

77. The CAPs deny AT&T's assertion in paragraph 77 that "the Commission should find that the Defendants' quasi-contract claim is pre-empted by the Act and the Commission's regulatory regime. The Commission does not have the authority to tell the SDNY Court that it cannot hear the CAPs' *quantum meruit* claims, and AT&T admits this fact in its footnote 87. In the following paragraphs and in the accompanying Brief, the CAPs will demonstrate that the Commission has never held that its regulations or the Communications Act preempts carriers

[55] *America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, 11 FCC Rcd 22494 22504 ¶ 24 (1996) (citing the *New Valley Order*).

without tariffs or contracts from pursuing equitable remedies in court, and in fact the Commission has found to the contrary in numerous decisions. The CAPs will also show that the SDNY Court and others fully support this conclusion, and that AT&T is estopped by its own actions from claiming otherwise.

78. The CAPs admit that their SDNY Court collection action complaint contains a claim in *quantum meruit*. This claim has merit. The CAPs deny AT&T's assertion in paragraph 78 that the Commission has found that the CAPs did not provide service to AT&T – the *Liability Order* contains no such finding, and AT&T cites to no support for its assertion. The *Eighth Report and Order* deals only with the provision of regulated services by common carriers, and does not prevent parties from pursuing equitable claims in court. Footnote 96 in *Farmers & Merchants III* expressly states that Farmers may seek compensation, despite the Commission's ruling that its tariff does not apply to access stimulation traffic at issue in its dispute with Qwest. Regarding footnote 88, the CAPs deny AT&T's assertions regarding the possible merits of their equitable claims. These are not before the Commission in the instant proceeding, as AT&T admits in footnote 87, and so are irrelevant.

79. The CAPs deny AT&T's assertion in paragraph 79 that any state law quasi-contract theory would be pre-empted. The case that AT&T cites in support for this assertion in footnote 89 – *AT&T v. FCC*[56] – in fact stands for the opposite. First, that court did not rule for either party in the collection dispute between Sprint PCS (which sought compensation) and AT&T (which did not want to pay), in which both parties sought review of a declaratory ruling by the Commission. The Court dismissed both parties' petitions, holding that the issues were not ripe for consideration.[57] But in doing so, the court made the following observations:

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[56] *AT&T Corp. v. FCC*, 349 F.3d 692, 701 (D.C. Cir. 2003).
[57] *Id.* at 375, 379.

> While it is preferable for carriers to memorialize such contracts in a written agreement, the parties here agree that there is no written agreement or any express contract between AT&T and Sprint PCS. Nevertheless, the law recognizes – as has the Commission –that an agreement may exist even absent an express contract. * * * Turning to the question whether there was such an agreement here, we believe that it is an issue that should be resolved by the Court.[58]
>
> AT&T and the Commission agree on three important points: First, state courts may not determine the reasonableness of a prior rate or set a prospective charge for service. Second, state courts may determine whether the parties have in place a contract that fixes access charges. And, third, access charges may be established by an express contract or an implied-in-fact contract in which the price was already fixed (such that the state court would not inquire into the reasonableness of the rate). AT&T does not contest these points and nothing in the *Declaratory Ruling* calls these matters into question.[59]

In these findings, the Court makes clear that there is no automatic preemption of state law-based equitable claims. Moreover, because the Court expressly states that AT&T agrees that courts may consider such claims, AT&T is estopped from making the opposite argument in the instant proceeding.

80. The CAPs deny that state law quasi-contract claims are preempted in this case because the CAPs can only recover through tariffs or contracts. In fact, AT&T is estopped from making this argument because both AT&T Corp. and its individual incumbent local exchange carrier affiliates routinely pursue such claims in federal court. Here are some examples:

- *AT&T Corp. v. Mosaica Education, Inc., et al,* 2008 WL 2705422, *1 (D. De.., July 10, 2009) (AT&T Corp. sues under "breach of contract, tariff violation, and quantum meruit/unjust enrichment.")

- *AT&T Corp. v. The Vialink Co.*, 2005 WL 2007102, *1 (N.D. Tx., Dallas Div., Aug. 18, 2005) (AT&T Corp. sues under "breach of contract, claim on account, and unjust enrichment.")

- *AT&T Corp. v. Michigan Internet Assoc., Ltd.,* 2008 WL 1766652, *1 (E.D. Mi., Southern Div., Apr. 16, 2008) (AT&T Corp. sues under "breach of contract and quantum meruit/unjust enrichment). "To the extent that Plaintiff provided

[58] *Id.* at 374 (emphasis added).
[59] *Id.* at 378 (emphasis added).

telecommunications services to Defendant over the years but cannot establish that these services were governed by written or oral agreements, it may seek to recover for these services under the quantum meruit/unjust enrichment theory advanced in its complaint. Moreover, it may continue to pursue this and its breach of contract theory in the alternative, so long as questions of fact remain as to whether all of the services provided by Plaintiff were covered under a contract. *Id.* at *2 (emphasis added).

- *AT&T Corp. v. MerchantWired L.L.C.*, 2006 WL 3076671, *1 (S.D. IN., Oct. 27, 2006) (AT&T Corp. sues under breach of contract and quantum meruit/unjust enrichment). MerchantWired claims that AT&T cannot pursue a claim for quantum meruit because AT&T is seeking to recover the same amounts for the same services it is attempting to recover under its breach of contract claim. AT&T contends that its claim for quantum is an alternative claim upon which relief could be granted in the event that the contracts relied upon by AT&T were found to be invalid. AT&T further contends that since its quantum meruit claim is an alternative claim, there is no threat of double recovery. *Id.* at *6 (emphasis added). * * * Even if an express contract exists, a plaintiff is allowed to plead a quantum meruit claim in the alternative in case the express contract is found to be invalid. *Id.* at *7.

- *Southwestern Bell Tel. Co. v. Fitch*, 643 F. Supp. 2d 902, 905 (2009) (AT&T Texas sues under "breach of contract, *quantum meruit*, and anticipatory breach.) "As held above, federal procedural rules permit AT&T Texas to plead in the alternative. Although a party 'generally cannot recover under *quantum meruit* when there is a valid contract covering the services or materials furnished,' the party 'may, however, seek alternative relief under both contract and quasi-contract theories.'" *Id.* at 911 (citations omitted).

There are many more examples. AT&T's argument that the *Eighth Report and Order* only allows recovery through contract or tariff, and preempts all equitable claims, if true, would surely apply to AT&T in its role as a carrier. But AT&T seeks to deny the CAPs the very relief that it routinely seeks before federal courts, demonstrating that it knows the position it is now taking before this Commission is a lie. By its actions, AT&T is estopped from making its preemption argument.

81. The CAPs agree that AT&T correctly quotes *Iowa Network Services* in paragraph 81, and agree that as a legal principal equitable relief is not available when "there is a regulatory scheme in place" that "provides a compensation mechanism." However, by voiding the CAP tariffs *ab initio*, years after AT&T took the service, the *Liability Order* denies the CAPs any

compensation mechanism, and effectively removes them from the *Eighth Report and Order's* regulatory scheme. The *Liability Order* creates a regulatory gap that must be filled by courts using equitable principals.[60] This is why the federal rules expressly allow parties to plead claims in equity alongside clams in tariff or contract, as each of the cases in the answer to paragraph 80 above, attest. The CAPs deny that the Communications Act and the Commission's rules hold that a carrier may recover, if at all, only by tariff or contract. The "if at all" language was inserted by AT&T – the sources of authority AT&T cites do not require a party to provide service to another without compensation, nor could they. The CAPs deny that equitable claims would "displace the federal regulatory regime" – by voiding the CAP tariffs ab initio, and making findings that clarify that the CAPs are not, and never were, common carriers, the *Liability Order* has removed the CAPs from any applicable regulatory regime. Regarding the cases cited in footnote 90, all confirmed that regulatory relief remained available to the affected parties: *Iowa Network Services* held that: "In the present case, the [Iowa Utilities] Board determined INS should seek compensation from the originating third-party wireless carriers through a negotiated (or Board arbitrated) interconnection agreement, and that any such agreement would apply retroactively."[61] Iowa Network Services was subsequently followed by the District of South Dakota in *Northern Valley v. Qwest.*[62] In that case, the court found that the filed rate doctrine would preempt equitable claims only if the court found that the tariff applied, and relief was available under the tariff:

> It is crucial to note, however, that this is all the tariff governs. In order for the filed rate doctrine to serve its purpose, therefore, it need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff. * * * The antidiscrimination policy [of the filed rate doctrine] applies to ensure that purchasers of services

[60] *E.g., MetTel v. GNAPS,* 2010 WL 1326095 (2010) at 2.
[61] *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2nd 850, 905 (S.D. IA 2005).
[62] *Northern Valley Comm's, LLC v. Qwest Comm's Corp.*, 659 F. Supp. 2d 1062 (D.S.D. 2009).

> covered by the tariff will pay the same rate. The policy does not per se extend to services not covered by the tariffs.[63]
>
> Where, as here, it is alleged that the charges as set out in Northern Valley's tariffs do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat Northern Valley's unjust enrichment claim.[64]

The *Union Tel* case is discussed in the answer to paragraph 65 above, and involves a court enforcing the provisions of a valid tariff. AT&T fares better with two cases – *Connect Insured*[65] and *XChange Telecom.*[66] In the former case, the court adopted the argument AT&T makes in its Supplemental Complaint – that equitable claims are barred by the FCC tariff and contract-based regulatory scheme. In the latter case, the court found that equitable claims are barred by the Filed Rate Doctrine, and argument that AT&T does not make. These cases are wrongly decided, and cannot stand against the weight of the *New Valley decisions, America's Choice, Iowa Network Services, Northern Valley, MetTel v. GNAPs,* and the five cases cited in the answer to paragraph 80. Indeed, the *Connect Insured* and *XChange Telecom* Courts cited cases like *Iowa Network Services* for support, showing that they clearly misunderstood the precedent. Significantly, the *MetTel v. GNAPs* court noted the minority of contrary rulings when it issued its decision. That court found that the MetTel tariff did not apply to the traffic at issue, but denied GNAPS' motion to dismiss MetTel's equitable claims, and awarded MetTel equitable relief. In so doing, the court stated:

> Global contends, both in its summary judgment papers and again in its post-trial briefing, that this state law claim is preempted by the federal tariff regime. The tension inherent in Global's position is obvious: defendant contends that it is not subject to MetTel's filed tariff rates, while arguing that the statutory rate system precludes the unjust enrichment claims. The Court rejects Global's contention as

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[63] *Id.* at 1068.
[64] *Id.* at 1070 citing *Iowa Network Services*, 466 F.3d at 1097.
[65] *Connect Insured Telephone, Inc. v. Qwest Long Distance*, 2012 WL 2995063 (N.D. TX., July 23, 2012).
[66] *XChange Telecom Corp., v. Sprint Spectrum*, L.P., 2014 WL 4637042, N.D.N.Y., Sept. 16, 2014).

> legally unsupported. * * * Although Global cites to various cases in which other courts have held that unjust enrichment claims are barred pursuant to the filed rate doctrine, those cases are not binding on this Court and, in any event, given the state of the legal landscape, their analyses as to the implications of the filed rate doctrine are not persuasive to this Court in evaluating the instant facts.[67]

82. The CAPs admit that AT&T correctly summarizes the regulatory structure established in the *CLEC Access Charge Reform Order* in paragraph 82. The CAPs deny that this regulatory scheme precludes equitable relief. The reference to *Qwest Commcn's Co. LLC v. Northern Valley Commcn's, LLC*[68] is misplaced, however – that order does not discuss *quantum meruit*, quasi-contract, or any other form of equitable relief, much less preempt them. In fact, the Commission has never made such a finding in any access stimulation case, because the instant case is the first one that has progressed to the "damages" phase. AT&T admits this in footnote 94 to of its Supplemental Complaint: "To be sure, the Commission has not yet ruled in a specific case whether traffic pumping LECs can recover alternative compensation, or, if so, to what extent." As discussed in the answer to the preceding paragraph, *Connect Insured* is demonstrably wrongly decided.

83. The CAPs deny that equitable relief is barred to them, for reasons discussed above in this Answer and in the accompanying Brief. The CAPs admit that AT&T correctly quotes from the *Iowa Network Services* decision, but as the CAPs demonstrate in their answer to paragraph 81, that decision only denied equitable claims after finding that a regulatory alternative – arbitration conducted before the Iowa Utilities Board, which would have retroactive effect – was available to the parties. That case does not support AT&T's claims here, which would deny the CAPs any recourse after the *Liability Order* invalidated their tariffs retroactively. The CAPs have already demonstrated that AT&T v. FCC does not support

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[67] 2010 WL 1326095 at 3, citing *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998) (emphasis added)..
[68] 26 FCC Rcd 8332 (2011).

AT&T's argument. In their answer to paragraph 79, the CAPs quote the plain language from that decision, which demonstrates that it supports the CAPs' pursuit of equitable relief from the SDNY Court. Regarding footnote 91: The CAPs have already demonstrated that *Marcus v. AT&T* does not support AT&T's argument – in fact it was cited as support by the *MetTel v. GNAPS* court in reaching the opposite conclusion. See discussion in answer to paragraph 82 and CAP footnote 72. *PaeTec v. CommPartners*[69] also does not support AT&T's assertion. That court did find that the PaeTec access tariff did not apply, and did bar equitable claims, but only after finding that the intercarrier compensation provisions of § 251 of the Communications Act apply to the dispute: "My decision turns only on § 251."[70] That decision resolved the liability phase of the case, and the subsequent damages phase would determine the amounts of compensation available to the plaintiff.[71] *Alliance v. Global Crossing*[72] is irrelevant to the instant case because equitable claims were dismissed only after the court found that valid tariffs were in effect, and governed the rights and responsibilities of the parties: "There is no dispute that plaintiffs operated under valid tariffs."[73] *Advamtel v. AT&T* is discussed and quoted in the CAP footnotes 36 and 42, which demonstrate that the court only dismissed equitable claims after finding that a valid tariff was in force. In *Brandenberg v. Sprint*[74], equitable claims were dismissed, but both parties and the court acknowledged that a valid tariff was in place and governed the rights and responsibilities of the parties, and so that case is not relevant to the case at bar. Finally, the *WorldCom v. PaeTec* case is discussed in the CAPs' answer to paragraph 36, and the carrier at issue was a CLEC with a valid tariff. In short – all of the cases cited in

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[69] *PaeTec Commc'ns Inc. v. CommPartners*, LLC, 2010 WL 1767193 (D.D.C. Feb. 18, 2010).
[70] *Id.* at *4.
[71] *Id.* at *5.
[72] *Alliance Commc'ns Coop., Inc. v. Global Crossing Telecomms.*, Inc., 663 F. Supp. 2d 807 (D.S.D. 2009).
[73] *Id.* at 819.
[74] *Brandenberg Tel. Co. v. Sprint Commc'ns Inc.*, 2010 WL 881735 (W.D. Ky. Mar. 4, 2010).

asserted support of AT&T's argument had valid tariffs in place. As a result, none of those cases involved the same regulatory "gap" that is involved in this case by effect of the *Liability Order*. The CAPs fully acknowledge that equitable claims cannot be pursued when a valid tariff or contract is in place. Unfortunately, given the ruling in the *Liability Order*, that is not the case in the instant proceeding. Footnote 92 is a citation and does not require a response.

84. The CAPs deny that "mileage pumping" has anything to do with this case – the only traffic at issue are Local Switching "tail circuits" of calls routed by AT&T to Beehive. The *Jefferson* decision was part of a series of three cases, all decided under the Powell Administration during 2001 and 2002, in which the Commission rejected AT&T's arguments that it was not obligated to pay access charges for access stimulation services.[75] Those cases stand for the proposition that access stimulation traffic is switched access traffic, properly tariffed, and charged at switched access rates. That fact is confirmed in the *Connect America Order*,[76] in which the Commission adopted rules that confirmed that access stimulation was switched access, properly tariffed, and charged at a new category of lower switched access rates that the Commission put into effect on a prospective basis.[77] Under the Genachowski Administration, the *Liability Order* dismissed the CAPs' reliance on these cases,[78] invalidated their tariffs *ab initio*, and found that they were not operating as "bona fide CLECs." The result of these findings is that the CAPs are not, and never were, common carriers, and are not subject to Title II regulation. Footnote 93 is a citation, and does not require a response.

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[75] Legal analysis in support of the CLECs' Answer to AT&T's Amended Formal Complaint, dated June 14, 2010, at 15 nn. 27 & 28, citing *AT&T Corp. v. Jefferson Tel.*, E-97-07, 16 FCC Rcd. 16130, 16130 (2001), *AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd 11641 (2002), and *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002).

[76] *Connect America Fund,* 26 FCC Rcd 17663 (2011) (*"Connect America Order"*).

[77] *Id.* at 17874-890 ¶¶ 656-701.

[78] 28 FCC Rcd at 3492 ¶ 33.